Supreme Court, U.S.
FILED

09-406 SEP 14 2009

OFFICE OF THE CLERK

Docket No

---

In The

# Supreme Court of the United States

---

UNITED STATES ex rel. DARIAN

Plaintiff-Petitioner,

vs.

ACCENT BUILDERS, INC., et al.

Defendant

DAVID J. PASTERNAK et. al.

Defendant-Respondent.

---

**On Petition For Writ Of Certiorari**
**To The United States Court of Appeals**
**For The Ninth Circuit**

---

## PETITION FOR WRIT OF CERTIORARI

---

Bruce H. Darian
P.O. Box 42
Hollywood, CA 90028
Tel. 310-428-8131
Fax 310-374-0134

## QUESTIONS PRESENTED FOR REVIEW

**1.** Relator is a person who is expressly authorized to bring suit on his own behalf and on behalf of the Government.

**2.** State court receiver David J. Pasternak, his law firm and the state is a person under the False Claims Act.

**3.** The FCA has original jurisdiction over all claims, both federal and state and pre-empts all other actions.

**4.** Relator's constitutional right to due process was violated by ruling without hearings.

**5.** The United States is the Plaintiff under the False Claims Act and thus Relator and the U.S. Government are statutorily entitled to 60 days from final judgment in filing an appeal.

6. The Government has no claims without Relator's continuing right to prosecute his claims.



**LIST OF ALL PARTIES TO PROCEEDINGS BELOW**

UNITED STATES OF AMERICA ex rel. DARIAN

Plaintiff-Petitioner,

vs.

UNITED STATES OF AMERICA

Plaintiff

vs.

STATE OF CALIFORNIA, CALIFORNIA DEPARTMMENT OF PARKS AND RECREATION, CALIFORNIA DEPARTMENT OF GENERAL SERVICES, CALIFORNIA CONTRACTORS STATE LICENSE BOARD, CALIFORNIA OCCUPATIONAL SAFTEY AND HEALTH ADMINISTRATION, CALIFORNIA REGIONAL WATER

QUALITY CONTROL BOARD, JUDICIAL COUNCIL OF CALIFORNIA, LOS ANGELES SUPERIOR COURT, LOS ANGELES SUPERIOR COURT SANTA MONICA, LOS ANGELES COUNTY SANITATION DISTRICT #2, LOS ANGELES COUNTY DISTRICT ATTORNEY, LOS ANGELES COUNTY SHERIFF'S DEPARTMENT, MALIBU LOST HILLS DIVISION, LAS VIRGENES MUNICIPAL WATER DISTRCT, CITY OF MALIBU, PEPPERDINE UNIVERSITY, GOVERNOR GRAY DAVIS, CALIFORNIA ATTORNEY GENERAL BILL LOCKYER, HONORABLE PATRICIA COLLINS, HONORABLE LAWRENCE MIRA, COMMISSIONER TERRY ADAMSON, RUSTY AREIAS, REGINALD DEMERY,IAN GAVINE, DAVE PETTWAY, TIM LA FRANCHI, TARA TODD, DARLENE ATKINSON, DOUGLAS WITT, TOM CARVER, GARY STEVENS, RICHARD BARTON, C. LANCE BARNETT, MIKE BROWN, PAM ALBERTI, MARIANE HENKEL, GLORIA R. LANGLEY, JANEECE R. HARDS, BILL SIENER, RENE GARCIA, DENNIS DICKERSON, WENDY PHILLIPS, LEROY BACA, MARTIN L. HERSCOWITZ, MIKE WILSON, ALLYSON KIMMEL, MARNA MILLER, JOHN O'BRIEN, THOM BRADSTOCK, PAT MAY, ERNESTO MASSONE, DON WIPPERT, CHRISTI HOGIN, JAMES COLBAUGH, WAYNE K. LEMIEUX, PHIL E. PHILLIPS, AMERICAN INTERNATIONAL COMPANIES, AMERICAN INTERNATIONAL GROUP, NATIONAL UNION FIRE INSURANCE OF PITTSBURGH INC., MALIBU BAY CO., LAMBERSON KOSTER & CO., INTERNATIONAL HARDWOODS, SUPERIOR GUNITE INC., ACCENT BUILDERS INC., FYFE CO. INC., FIBRWRAP CONSTRUCTION CO. INC., DCA DRILLING AND CONSTRUCTION INC., HALCO SERVICE CORP., BOOKOUT PLUMBING INC., ARROW SECURITY, A. JEROLD PERENCHIO, ANTHONY LAWRENCE FEDERICO, RONALD RAY FEDERICO, ED

N. FYFE, HEATH CARR, HAROLD ORUM, HAROLD BOOKOUT, ROBERT G. KELLY, SUSAN GANNUSCIO, DON ROBINSON, DOES 1-10

Defendants ,

DAVID J. PASTERNAK, PASTERNAK, PASTERNAK AND PATTON

Defendants-Respondents.

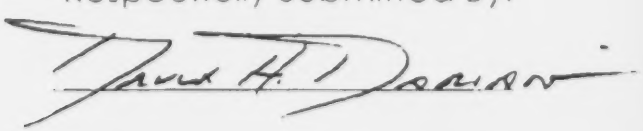
iii

**CORPORATE DISCLOSURE STATEMENT**

Appellant, Relator Bruce Darian owner of Darian Construction Co. is a sole proprietorship.

DATED: September 10, 2009

Respectfully Submitted By:



BRUCE H. DARIAN, In Pro Se
P.O. Box 42
Hollywood, CA 90078

## TABLE OF CONTENTS

Table of Authorities . . . . . vi-ix

Statement of Jurisdiction . . . . . 1

Statement of the Case . . . . . 1-11

Introduction . . . . . 12-18

Statement of Facts . . . . . 18-23

Summary of Argument . . . . . 24-25

Argument I . . . . . 25-31

Argument II . . . . . 32-35

Argument III . . . . . 36-52

Argument IV . . . . . 53-55

Argument V . . . . . 55-58

Argument Vi . . . . . 58

Standard of Review . . . . . .59-62

Conclusion . . . . . .62-64

Statement of Related Cases . . . . . 65

V

## TABLE OF AUTHORITIES

**United States Supreme Court**

Vermont v. Stevens,
529 U.S. 765; 120 S. Ct. 1858; 146 L. Ed. 2d 836;. . . . .
. . . . . 4,7,58

Steel Co. v. Citizens for Better Environment,
523 U.S. 83, 93-102, 140 L. Ed. 2d 210, 118 S. Ct. 1003
(1998) . . . . . .27

Friends of Earth, Inc. v. Laidlaw Environmental
Services (TOC), Inc.
528 U.S. 167, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000)
(slip op., at 9 . . . . . .27

Whitmore v. Arkansas
495 U.S. 149, 155, 109 L. Ed. 2d 135, 110 S. Ct. 1717
(1990) . . . . . 28

Simon v. Eastern Ky. Welfare Rights Organization,

426 U.S. 26, 41, 48 L. Ed. 2d 450, 96 S. Ct. 1917 (1976). . . . . .28

Lujan v. Defenders of Wildlife
504 U.S. 555, 560, 119 L. Ed. 2d 351, 112 S. Ct. 2130 (1992) . . . . . 28

Poller v. Columbia Broadcasting System, Inc.
368 U.S. 464, 465, 7 L. Ed. 2d 458, 82 S. Ct. 486 (1962) . . . . . .30

Automatic Radio Mfg. Co. v. Hazeltine Research, Inc.,
339 U.S. 827, 829, 94 L. Ed. 1312, 70 S. Ct. 894 (1950) . . . . . .30

Hubbard v. Tod,
171 U.S. 474, 475, 43 L. Ed. 246, 19 S. Ct. 14 (1898) . . . . . .30

Vimar Seguros y Reaseguros, S. A. v. M/V Sky Reefer,
515 U.S. 528, 531, 132 L. Ed. 2d 462, 115 S. Ct. 2322 (1995) . . . . . .30

Musick, Peeler & Garrett v. Employers Ins. of Wausau,
508 U.S. 286, 288, 124 L. Ed. 2d 194, 113 S. Ct. 2085 (1993). . . . . 30

Ashwander v. TVA,
297 U.S. 288, 348, 80 L. Ed. 6881936), 56 S. Ct. 466 . . . . . .32

Mistretta v. United States

488 U.S. 361, 384, 102 L. Ed. 2d 714, 109 S. Ct. 647 (1989) . . . . . 59

Bowsher v. Synar,
478 U.S. 714, 736, 92 L. Ed. 2d 583, 106 S. Ct. 3181 (1986) . . . . . 59

Communications Workers of America v. Beck
487 U.S. 735, 762, 101 L. Ed. 2d 634, 108 S. Ct. 2641 (1988). . . . . 59

Fullilove v. Klutznick,
448 U.S. 448, 472, 65 L. Ed. 2d 902, 100 S. Ct. 2758 (1980) . . . . . .60

Botsford v. Blue Cross
314 F.3d 390,393 U.S. 2002 U.S. App. LEXIS 26457 . . . . . .61

**9th Circuit Cases**

*Roach v. Mail Handlers Benefit Plan, CAN,*
298 F.3d 847, 849 (9th Cir. 2002). . . . . .61

*Gray v. First Winthrop Corp.,*
989 F.2d 1564, 1567 (9th Cir. 1993). . . . . .59

U.S. ex rel. Kelly v. Boeing
9 F.3d 743 at 757 (9th Cir. 1993) . . . . . 5,6,7,60

Delta Savings Bank v. United States
265 F.3d 1017, 1024 (9th Cir. 2001) . . . . . .61

**STATUTES**

31 U.S.C. § 3729 (a) . . . . . .18,26,32,51,52

§ 3730(a) . . . . . .17,26

§ 3730(b)(1) . . . . . .26,41

§ 3730(b)(2) . . . . . 24,41,54,55

§ 3730(c)(1) . . . . . .55

§ 3730(c)(2). . . . . .55

3 W. Blackstone, Commentaries *160 . . . . . 27,29

Article III of the Constitution . . . . . 27,28,59

2 W. Blackstone, Commentaries *437 . . . . . .29

L. Simpson, Law of Suretyship 205 (1950) . . . . . .30

31 U.S.C. §§ 3729-3733 . . . . . 32,51

AMENDMENT XIV; Section . . . . . .31

H. R. Rep. No. 2, 37th Cong., 2d Sess.,
pt. ii-a, pp. XXXVIII-XXXIX (1862) . . . . . 33

VI

## STATEMENT OF JURISDICTION

Relator has filed the Petition within 60 days of the Ninth Circuit Court's revised Order and Memorandum of June 16, 2009.

VII

## STATEMENT OF THE CASE

**Relator Bruce Darian filed a False Claims Act Qui Tam action under seal and serving only the U.S Attorney General and the U.S. Attorney's office for Los Angeles in U.S. District Court for the Central District on September 21, 2000. ( C.T. 1)**

After several months and several volumes of Disclosure Statements supplying the Government with all material evidence, the Government filed a motion to unseal the action, allow Relator the

unfettered right under the statute to conduct the action and be served with all briefing, orders, and all other correspondence in the event it elects to intervene and prosecute the case.

The Court granted the Motion and ordered the Qui Tam action be served in accordance with FRCP by Relator Bruce Darian on his own behalf and in the name of the United States Government.

Relator was forbidden from serving a 60 day notice of Intent to sue under the FWPCA on the defendants until which time the case was unsealed other wise the existence of the Qui Tam action would have been revealed to the Defendants before which time the Government had time to assess the Qui Tam action.

Relator served the required notice allowed 60 days to pass, and then served the False Claims Act action on the Defendants in August of 2001. Additionally the Court had granted an extension past the 120 days to serve any remaining Defendants because of the 60 day waiting period under the FWPCA citizen provisions.

All of the Defendants filed Motions to Dismiss citing FRCP 12 b 6, FRCP 8 and FRCP 9 or in the alternative a more defenite statement.
On December 10, 2001 the Court granted all of the Defendants Motions citing FRCP 8. That Relator had not complied with rule 8 because all Defendants were listed with all causes of actions. This order was without prejudice and allowed Relator to amend the complaint, except for the State of California and it's agencies which were

with prejudice citing the 11th Amendment Immunity.

Relator amended his complaint and reserved it on the Defendants in January 2002. Defendants filed a Motion to Dismiss citing the exact same rules under FRCP. The United States Government as Plaintiff filed an amicus brief requesting the motions not be granted and that Defendant Pasternak's contention that Relator was only representing himself was argued by the Government that it was important that the proper interpretation of the statute be followed and that Relator Darian did have the right by way of the clear wording of the Act, the legislative history, Congress' intention to root out fraud and the binding authority in the Supreme Court case Vermont v.

Stevens and this Court's binding precedent in Kelly v. Boeing. The Court did not hold a hearing but instead took the motions under submission and did not rule until four and a half months later on September 5, 2002.

Once again the Court ruled for the Defendant's stating that Relator had violated FRCP 9 by not pleading with the required particularity, but rejected the Defendants claim that Relator continued to violate FRCP 8. The stated that the Defendants were on clear notice of their alleged wrong doing. The Court additionally granted Defendant Pasternak who is a state court receiver in a related state court action motion to dismiss without prejudice on the premise that the State Court judge (who is Defendant Honorable Patricia Collins vacate her injunction barring any action in federal court under the False Claims Act providing

it was not inconsistent with any federal order).

'Defendants Collins, Mira and Adamson were all dismissed with prejudice under Absolute Judicial immunity.

The Court sua sponte ordered the case title to be amended in February 2002, removing the United States. and upon an unopposed motion brought by Relator in September 2002 after the rulings cited binding 9th circuit court precedent U.S. ex rel. Kelly v. Boeing stating that Relator has the full right to conduct the case for himself and in the name of the Plaintiff Government as the real party in interest.

In December 2002 Relator filed a 394 page 3rd amended complaint with exhibits totaling 911 pages a second 3rd Amended Complaint was served about two weeks later due to typing errors.

The Defendants filed motions to dismiss citing FRCP 12 b 6, FRCP 9 and revisiting what Defe3ndant Pasternak had advanced in February 2002 (that Darian can only represent himself and no one else.)

The Court had already addressed this matter by hearing the Government in it's brief cite Vermont v. Stevens and Kelly v. Boeing.

Additionally the Defendants did not file any opposition to Relators motion to correct the case title to reflect that the United States was and continues to be the Plaintiff and real party in interest.

Defendants cited a District Court case from the central district in which Nira Swartz had stipulated to not having authority to conduct a FCA action and requested the assistance of counsel at the governments expense which is in violation of the

statute which requires the action be conducted at the Relator's expense.

The Court once again rejected any hearings and stated it would rule on the motions in chambers.

After almost four months Relator brought a motion a 3rd motion to consolidate all of the federal and state litigation arising from the same set of operative facts to the FCA action which the statute requires.

The Court denied the Motion to Consolidate the cases and an Appeal ensued on August 2003.

Relator removed according to statute the state court actionj which bwas before the 2nd Appellate Court to the U.S. District Court. This case was assigned to the Honorable Dickran Teverizian. This action was remanded to the 2nd Appellate Court without hearing and the 2nd Appellate Court

dismissed the action pending a motion for clarification of the brief submitted.

The appeal was dismissed for lack of jurisdiction and the case was remanded to the district court.

In January 2005 the district court granted the defendants motions to dismiss without prejudice, however the court now added the requirement that Relator could not continue with the action unless the complaint was filed by a licensed attorney.

Relator filed an appeal to those orders

Additionally the Government has filed yetn another amicus brief stating it did not want the Accent Builders Defendants dismissed.

The Ninth Circuit dismissed the appeal in July of 2006 stating it did not have jurisdiction and the case was remanded to the district court. The Defendants had filed motions to dismiss the case

before the Appellate court had remanded the case which were rejected by the district court. However when the case was remanded the court granted all of the motions to dismiss stating that Relator had not filed a 4th Amended Complaint as ordered by a licensed attorney.

The Court denied the Accent Builders and Superior Gunite Defendant's motion to dismiss the RICO claim and the Court put the case at issue.

Defendant Fyfe filed for interlocutory certification which was denied, Defendant Pasternak filed a month later and the Court granted that motion, however denied Lamberson Koster, Accent Builders and International's motion for attorney fees.

Relator sought discovery which was impeded by the Accent and Superior defendants. Relator brought a motion before the discovery magistrate

for disputed discovery. This motion was denied without oral hearing even though it was requested. Relator brought another discovery motionj which was again denied without hearing before the discovery magistrate.

Defendant's had a pending Motion for Summary Judgement which Relator responded to. Oral Argument was requested on this long and drawn out case. This request along with every other request for hearing was denied.

The Court granted Defendants motions in July of 2007. Relator brought a motion for reconsideration which was denied in September 2007.

The United States rejected the courts dismissal and the court amended the order to not implicate the United States in October 2007.

Relator filed his timely appeal.

VIII

## INTRODUCTION

Relator Bruce Darian was a long standing community leader in the City of Malibu. Relator grew up surfing at the famous beach in early 1974. Has a residence on the beach 200 feet from the Malibu Pier's property. Relator was a charter member of the State of California's Adopt-A-Beach program from 1991- 2001 on Pacific Coast Hwy, served as Co-Chair of Malibu's Public Safety Committee from 1993-1997, recipient of a City of Malibu Commendation for removal of graffiti, member of Optimist International's Malibu Charter, sponsor of numerous sports teams on the college, high school and organized little league levels as well as scouting. Relator received a letter from the City of Malibu in grateful appreciation for

exemplary service as the Contractor in the renovation of the Los Angeles Sheriff station to it's new City Hall in Malibu.

Relator for many years while living on the beach right next to the Malibu Pier, had a vision to restore the famous landmark. Relator stated making serious preparations to become involved right after successfully building the new City Hall in 1994. The Malibu Pier was closed of at the shore line to the public in January 1994. Relator finished the City Hall on February 25, 2004.

The City of Malibu hired the engineering company of Moffit & Nicols to evaluate the condition and the cost to rebuild a new pier. The choices were Monolithic, steel piles coated with polyethylene and wood decking, or an all wood H15 or H10

rated pier (15 or 10 ton capacity). The City elected the all wood 10 ton and put it out for bid. Several bids came in, however, the City retracted the bidding and did nothing. In the summer of 1994.

At this same time Relator was working with a renowned biologist and water quality expert to stop the out flow of sewage and effluent to Malibu Canyon. Relator had circulated and received hundreds of signatures to stop the illegal discharging to Malibu Creek.

For the next three years Defendants City of Malibu, County of Los Angeles and Department of Parks and Recreation were negotiating how the pier would be rebuilt, who would run the pier and who would finance it.

All of this came to a head when the winter months of 1997 were approaching in September. The City having experience with the Paradise Cove Pier being completely broken apart except for a very short portion at the shore line in 1983 voted to terminate it's control of the pier and relinquish it back to the Department of Parks and Recreation who purchased it with the tax payers money of California in 1980 at auction from Bill Hubert.
At this same time Relator had already fully photographed the entire pier from the pier itself, the shoreline and the water photographing every piling of the pier. Relator submitted to the City of Malibu a bid of 197,000.00 to fully install 1 ¼ " diameter stainless steel cable with steel collars to prevent the pier from coming apart during large surf in the approaching el nino winter of 1997.

The State acknowledged the proposal, but elected to have tug boats on stand by in the event the pier came apart during large surf. (This method would be totally ineffective being that 8 foot plus surf would prevent any boat from coming within range of the pier without the threat of being crushed into the pier by the surf.

The winter came and went without incident.

In winter of 1998 Relator worked with officials and was granted three small contracts to install new roofing on the outer west building, a new back flow main valve, new fire stand pipes which brought back the fire system being operational. Additionally drove test probes at several locations on the pier to determine the bedrock profile for pile driving purposes. The only other work performed to this date on the pier as part of this rebuilding project was the sampling and testing of

hazardous material and it's subsequent report which was incorporated into the contract documents.

Plaintiff United States of America ex rel. Darian brought suit for himself and for, the United States Government, See 31 U.S.C. § 3730(a)(b). U.S. Relator Darian brought suit against several state, county and city officials in both their official and individual capacities and several private corporations and their officers including Pepperdine University, Las Virgenes Metropolitan Water District, and Los Angeles County Sanitation and Los Angeles County Sheriff's Department. The case is derived from the illegal contracting activities at the Malibu Pier restoration, and the illegal activities in discharging pollutants into a tributary of a United States navigable water and

directly discharging into U.S waters in violation of the False Claims Act, Federal Water Pollution Control Act, and the Resource Conservation Recovery Act. known as FCA, FWPCA, and RCRA (Excerpt No. C.R.1, 384). 31 U.S.C. § 3729, 33 USCS 1365, 42 USCS 6972

## IX

## STATEMENT OF FACTS

1. On May 20, 1999 Appellant/Relator drafted, signed and personally drove to Sacramento to submit a bid drafted by Relator to the Department of Parks and Recreation in Sacramento, California. The bid was to rebuild the Malibu Pier, bid opening was at 2:00 P.M. in which Appellant/Relator was present along with two other representatives from other contracting entities who submitted bids for

the Malibu Pier. Accent Builders took no part in drafting the bid, nor was anyone from Accent present at bid opening. (Excerpt No. C.R. 384 ).

**2.** On September 22, 2000 Relator (Appellant) filed a False Claims Act action under seal in the United States District Court (Excerpt No. C.R. 1).

**3.** On May 18, 2001 the Court ordered the seal lifted along with the notice by the United States of America to decline intervention, requesting all pleadings and authorizing Relator to conduct the action.. (Excerpt No. C.R. 19).

**4.** On June 29, 2001 Relator gave 60 day notice to the defendants of the False Claims Act action and of an intent to sue under the Federal Water Pollution Act 33 USC 1365 (Excerpt No. C.R. 21).

**5.** On August 27, 2001 Relator filed his First Amended Complaint before serving the defendants in the action (Excerpt No. C.R. 26).

**6.** On August 28, 2001 Relator filed an Ex Parte application to stay all further state court proceedings and enjoining related state cases. (Excerpt No. C.R. 24)

**7.** On December 12, 2001 the Court granted the defendants motions to dismiss the First Amended Complaint and granted Relator 30 days to file an amended pleading. (Excerpt No. C.R. 215, 154, 155, 142)

**8.** On January 10, 2002 Relator filed his Second Amended Complaint

**9.** On February 15, 2002 Relator sought to transfer the state action BC249677 to Federal Court or for a stay of the action in state court.

**10.** On March 28, 2002 Plaintiff U.S. Government under the False Claims Act filed a request for an amicus curiae brief to be filed in opposition to the motions to dismiss.

**11.** On April 10, 2002 the Plaintiff U.S. Government filed an amicus curiae brief in opposition to David J. Pasternak and Pasternak, Pasternak and Patton's motion to dismiss

**12.** On August 2, 2002 Relator filed motions for sanctions against several defendants for failure to develop and submit a legitimate discovery plan

**13.** On August 22, 2002 Relator brought again a motion to transfer related state cases to the federal court.

**14.** On September 5, 2002 the Court granted the defendants motion to dismiss the Second Amended Complaint and granted Relator the right to file a Third Amended Complaint. (Excerpt No C.R. 341 thru 356).

**15.** On December 30, 2002 Relator filed his Third Amended Complaint . (Excerpt No. C.R. 384).

**16.** On April 2, 2003 The Court on it's own motion continues the hearing on the motions to dismiss (Excerpt No. C.R. 473).

**17.** On April 7, 2003 the Plaintiff United States Government files an opposition to various motions to dismiss (Excerpt No. C.R 481-482).

**18.** On April 24, 2003 the Court, on it's own motion takes under submission all of the motions without hearings or oral argument. (Excerpt No. C.R. 488).

**19.** On July 7, 2003, Relator files a motion to remove state lawsuits to federal qui tam false claims act suit (Excerpt No. C.R. 501).

**20.** On July 22, 2003 the court denies Relators motion to remove state lawsuits (Excerpt No. C.R. 507).

**21.** On October 30, 2003 the court grants plaintiff's motion to restore the case title to include the United States name that was improperly

removed by the court on a previous order.

(Excerpt No. C.R. 520).

**22.** On January 7, 2005 the court grants all of the Defendants motions to dismiss under the FCA because Relator does not have or is not an attorney. ( Excerpt No. C.R. 528- 540).

**23.** On September 22, 2005 the court denies Plaintiff's ex parte applications for enlargement of time to file an opposition ( Excerpt No. C.R. 578 ).

**24.** On October 5, 2005 the Plaintiff U.S. Government objects to the dismissal of any potential claims of the United States Government. (Excerpt No. C.R. 587).

**25.** On November 22, 2005 the court dismisses many defendants from the 3rd amended complaint for not filing a 4th amended complaint by an attorney ( Excerpt No, C.R. 622 ).

X

## SUMMARY OF ARGUMENT

1. The Court committed clear error in misinterpreting the FCA and CWA statutes in dismissing Relator's causes of action on the sole basis *that Relator is not a lawyer.*

2. The FCA Super Pre-empts all other actions because the original source provisions are jurisdictional , concurrent or state jurisdiction actions could enable the plaintiffs in a state action to defeat the FCA by the very act of discovery in the action. Defendants in the federal FCA action could plead that the facts were part of a civil action in another court and seek dismissal on jurisdictional grounds .

The FCA expressly provides that no other person shall interfere with (31 U.S.C. 3730(b)(2)(5)).

3. Court violated Relator's right to due process by not allowing hearings on Defendant's numerous motions to dismiss a False Claims Act action.

4. The United States is the Plaintiff under the False Claims Act.

## XI

## ARGUMENT 1

RELATOR IS EXPRESSLY AUTHORIZED TO BRING SUIT ON HIS OWN BEHALF AND ON BEHALF OF THE GOVERNMENT

Originally enacted in 1863, the False Claims Act (FCA) is the most frequently used of a handful of extant laws creating a form of civil action [***843] known as *qui tam*. [1] [HN1] As amended, the [*769]

FCA imposes civil liability upon "any person" who, *inter alia*, "knowingly presents, or causes to be presented, to an officer or employee of the United States Government . . . a false or fraudulent claim for payment or approval." 31 U.S.C. § 3729 (a). The defendant is liable for up to treble damages and a civil penalty of up to $ 10,000 per claim. *Ibid.* [HN2] An FCA action may be commenced in one of two ways. First, the Government itself may bring a civil action against the alleged false claimant. § 3730(a). Second, as is relevant here, a private person (the "relator") may bring a *qui tam* civil action "for the person and for the United States Government" against the alleged false claimant, "in the name of the Government." § `(1).

*Qui tam* is short for the Latin phrase *qui tam pro domino rege quam pro se ipso in hac parte sequitur*, which means "who pursues this action on

our Lord the King's behalf as well as his own." The phrase dates from at least the time of Blackstone. See 3 W. Blackstone, Commentaries *160.

[***LEdHR2B] [2B]We first address the jurisdictional question whether respondent Stevens has standing under Article III of the Constitution to maintain this suit. See *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 93-102, 140 L. Ed. 2d 210, 118 S. Ct. 1003 (1998).

[***LEdHR4] [4][HN5] As we have frequently explained, a plaintiff must meet three requirements in order to establish Article III standing. See, *e.g.*, *Friends of Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, , 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000) (slip op., at 9). First, he must demonstrate "injury in fact" -- a harm that is both

"concrete" and "actual or imminent, not conjectural or hypothetical." *Whitmore* v. *Arkansas*, 495 U.S. 149, 155, 109 L. Ed. 2d 135, 110 S. Ct. 1717 (1990) (internal quotation marks and citation omitted). Second, he must establish causation -- a "fairly . . . traceable" connection between the alleged injury in fact and the alleged conduct of the defendant. *Simon* v. *Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 41, 48 L. Ed. 2d 450, 96 S. Ct. 1917 (1976). And third, he must demonstrate redressability -- a "substantial likelihood" [**1862] that the requested relief will remedy the alleged injury in fact. *Id.*, at 45. These requirements together constitute the "irreducible constitutional minimum" of standing, *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560, 119 L. Ed. 2d 351, 112 S. Ct. 2130 (1992), which is an "essential and unchanging part" of Article III's case-or-controversy

requirement, *ibid.*, and a key factor in dividing the power of government between the courts and the two political branches, see 504 U.S. at 559-560.

3 Blackstone noted, with regard to English *qui tam* actions, that "no particular person, A or B, has any right, claim or demand, in or upon [the bounty], till after action brought," and that the bounty constituted an "inchoate imperfect degree of property . . . [which] is not consummated till judgment." 2 W. Blackstone, Commentaries *437.

[HN11]

We believe, however, that adequate basis for the relator's suit for his bounty is to be found in the doctrine that the assignee of a claim has standing to assert the injury in fact suffered by the assignor.

The FCA can reasonably be regarded as effecting a partial assignment of the Government's damages claim. [4] Although we have never expressly recognized "representational standing" on the part of assignees, we have routinely entertained their suits, see, e.g., [*774] *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464, 465, 7 L. Ed. 2d 458, 82 S. Ct. 486 (1962); *Automatic Radio Mfg. Co.* v. *Hazeltine Research, Inc.*, 339 U.S. 827, 829, 94 L. Ed. 1312, 70 S. Ct. 894 (1950); *Hubbard* v. *Tod*, 171 U.S. 474, 475, 43 L. Ed. 246, 19 S. Ct. 14 (1898) -- and also suits by subrogees, who have been described as "equitable assignees," L. Simpson, Law of Suretyship 205 (1950), see, e.g., *Vimar Seguros y Reaseguros, S. A.* v. *M/V Sky Reefer*, 515 U.S. 528, 531, 132 L. Ed. 2d 462, 115 S. Ct. 2322 (1995); *Musick, Peeler & Garrett* v. *Employers Ins. of Wausau*, 508 U.S. 286, 288, 124 L.

Ed. 2d 194, 113 S. Ct. 2085 (1993). We conclude, therefore, that the United States' injury in fact suffices to confer standing on respondent Stevens.

AMENDMENT XIV; Section 1. ...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 4. The Validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned.

XII

## ARGUMENT 2

**State Court Receiver David J. Pasternak, his law firm , members of the Judiciary and the State are persons under the False Claims Act.**

This case presents the question whether a private individual may bring suit in federal court on behalf of the United States against a State (or state agency) under the False Claims Act, 31 U.S.C. §§ 3729-3733.

We of course express no view on the question whether an action in federal court by a *qui tam* relator against a State would run afoul of the Eleventh Amendment, but we note that there is "a serious doubt" on that score. *Ashwander* v. *TVA*,

297 U.S. 288, 348, 80 L. Ed. 6881936), 56 S. Ct. 466 ( (Brandeis, J., concurring) [***855] (internal quotation marks and citation omitted). [18]

[**1873] The False Claims Act is also all-embracing in scope, national in its purpose, and as capable of being violated by state as by individual action. [2] It was enacted during the Civil War, shortly after a congressional committee [*792] had decried the "fraud and peculation" by state officials in connection with the procurement of military supplies and Government contracts -- specifically mentioning the purchases of supplies by the States of Illinois, Indiana, New York, and Ohio. See H. R. Rep. No. 2, 37th Cong., 2d Sess., pt. ii-a, pp. XXXVIII-XXXIX (1862). Although the FCA was not enacted until the following year, the Court of Appeals for the Second Circuit correctly observed

that "it is difficult to suppose that when Congress considered the bills leading to the 1863 Act a year later it either meant to exclude the States from the 'persons' who were to be liable for the presentation of false claims to the federal government or had forgotten the results of this extensive investigation." 162 F.3d 195, 206 (1998). That observation is faithful to the broad construction of the Act that this Court consistently endorsed [***858] in cases decided before 1986 (and hardly requires any "suspension of disbelief" as the majority supposes, *ante*, at 16, n. 12).

DISSENT
JUSTICE STEVENS, with whom JUSTICE SOUTER joins, dissenting.

1. Defendant Judge Patricia Collins, Commissioner Terry Adamson, Judge

Lawrence Mira, Receiver David Pasternak were in clear absence of all jurisdiction.

2. Approving payments to contractors for their criminal contracting falsifications which were a long and well documented fraud.

Rigged Contracts, Falsified Change Orders, Falsified Payroll, Falsified Specifications, Falsified Stop Notices, Falsified Licenses, Falsified Receivership, False Statements, Terrorist Threats, False Arrest, Falsified Investigations, False Sheriff Reports, Falsification of State Documents. Falsified Pile Driving Logs, Falsified Safety Procedures, Falsified Environmental Certifications

## XIII

## ARGUMENT 3

## THE FCA HAS ORIGINAL JURISDICTION OVER ALL CLAIMS, BOTH FEDERAL AND STATE AND PRE-EMPTS ALL OTHER ACTIONS.

1. The purpose of the Complete Pre-emption doctrine is congress' intent of protecting federal jurisdiction for cases involving the federal False Claims Act.
2. The doctrine supports not having concurrent federal and state cases going simultaneously. 31 U.S.C. § 3730 (b)(5) is intended to prevent a double recovery from the defendants. Relator has no means of collecting in state court and is essentially "out of court." (Quackenbush v. Allstate citing Moses H. Cone Memorial

Hospital v. Mercury Construction Corp, 460 U.S. 1, 11, n. 11.)

3. False Claims Act defendants will try to raise the issue of res judicata if a state case proceeds ahead of the False Claims case. ( Erikson ex rel. United States v. American Institute of Biological Services 716 F. Supp. 908, 918 Ed Va 1989)
4. False Claims Act cases can be barred on possible jurisdiction grounds if claims are "publicly disclosed" in a prior hearing, 3730(e)(4)(b), ( United States ex rel. Jones v. Horizon Healthcare Corp., 160 F.3d 326 (6th Cir. 1998)
5. The filing of the case under seal and keeping the case under seal is prejudicial to the False Claims Act plaintiff as he is barred from taking any action while it is under seal.

Federal District court authority protects a relator from divulging any discovery that will be used in a False Claims Act case in any other forum.

United States ex rel. Bagley v. TRW, 2003 U.S. Dist. LEXIS 6101.

6. State Court plaintiffs are seeking to force Relator in the Federal False Claims Act case to engage in discovery in the state case which he has not done. Forcing the Relator to engage in discovery in another forum other than the Federal court is exactly what congress sought to prevent in enacting Federal jurisdiction of cases that arise from the same facts or occurrence. ( 31 U.S.C. 3732 (b)). This statutory construction would have little effect if it did not set out to protect the federal jurisdiction.
7. The ills of parallel federal and state litigation on the same facts and occurrence were well

thought out and recognized when Congress enacted the False Claims Act in 1863 and had amended it most recently in 1986 governing federal jurisdiction on False Claims Act cases.

8. These statutory guidelines are well founded and are different than discovery orders in the same state court venue because these jurisdictional bars that are part of the False Claims Act statute could defeat the whole case in federal court, not so with an order pertaining to the state discovery orders.

9. Judicial economy is wasted by the state court case, uneven application of the federal venue regarding the False Claims Act, and denial of a meaningful federal venue unfettered by state jurisdiction.

10. State court cannot order the same relief as it is not a False Claims Act action filed in state

court nor could it have been. All False Claims Act cases must be filed in the U.S. District Court and served only on the Attorney General and The U.S Attorney, serving any other party is grounds for terminating the case on jurisdictional grounds. (31 U.S.C. §3730 (b)(2) )

11. If a first to file rule has precedent over the clear statutory provision spelling out federal jurisdiction in all False Claims Act cases involving the same facts or occurrence, then it could be no simpler to completely defeat a potential False Claims Act Action by simply beating the Relator to the court house and filing a state court action, all the while knowing that the Relator's case must stay sealed for the statutory 60 days (or longer upon a showing of good cause by the Attorney General) and thereby eliminating a removal within the customary 30

days upon receiving the complaint. ( 31 U.S.C. § 3730(b),(1),(2),(4) )

**12.** While these arguments look to show the necessity of the Complete Pre-emption doctrine controlling federal jurisdiction it also shows how this question qualifies under that small class of orders that are completely separate from the merits of the case, too important to wait until final adjudication, and are essentially unreviewable at the end of trial. All of the statutory and jurisdictional bar that are in place under the False Claims Act make this clear.

The Supreme Court ruled in Brotherhood:

*Our jurisdiction to consider an appeal from an order denying intervention thus depends upon the nature of the applicant's right to intervene. If the right is absolute, the order is appealable and we*

*may judge it on its merits. But if the matter is one within the discretion of the trial court and if there is no abuse of discretion, the order is not appealable and we lack power to review it. In other words, our jurisdiction is identified by the necessary incidents of the right to intervene in each particular instance. We must therefore determine the question of our jurisdiction in this case by examining the character of the Brotherhood's right to intervene in the proceeding brought under § 16 (12) of the Interstate Commerce Act.*

*We start with Rule 24 (a) and (b) of the Federal Rules of Civil Procedure, applicable to a civil proceeding of this type. Rule 24 (a) deals with intervention of right and provides in pertinent part: "Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; . . . ." In contrast, Rule 24 (b) is concerned with permissive intervention and reads as follows: "Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."*

*The Brotherhood claims that as a consequence of either of two federal statutes -- § 17 (11) of the Interstate Commerce Act or 28 U. S. C. § 45a -- it has an absolute right to intervene within the meaning of Rule 24 (a) (1). It also alleges that it possesses an absolute right within the contemplation of Rule 24 (a) (2), the representation of its interest by existing parties being inadequate and the possibility that it may be bound by a judgment in the action being a real one. No claim to permissive intervention under Rule 24 (b) is made; nor is there a contention that the District Court abused any discretion it might have had.*

*In our view, § 17 (11) of the Interstate Commerce Act does give the Brotherhood an absolute right to intervene in the instant proceeding within the meaning of Rule 24 (a) (1). As set forth in 54 Stat. 916, n6 this portion of the Act reads: "Representatives of employees of a carrier, duly designated as such, may intervene and be heard in any proceeding arising under this Act affecting such employees." The following considerations make obvious the fact that the Brotherhood meets all the requirements of this provision:*

*n6 As it appears in the United States Code, 49 U. S. C. § 17 (11), this paragraph reads: "Representatives of employees of a carrier, duly designated as such, may intervene and be heard in any proceeding arising under this chapter and*

*chapters 8 and 12 of this title affecting such employees."*
*The words "this chapter" refer to Part I of the Interstate Commerce Act, which embodies the original statute known by that name prior to its division into parts. Chapter 8 relates to Part II of the Interstate Commerce Act, originally known as the Motor Carrier Act of 1935. Section 305 (h) of Part II is a cross-reference to § 17 of Part I: "All the provisions of section 17 of this title shall apply to all proceedings under this chapter." Chapter 12 is the equivalent of Part III of the Interstate Commerce Act, which deals with water carriers. Section 916 (a) is also a cross-reference to § 17 of Part I: 'The provisions of section 12 and section 17 of chapter 1 of this title and sections 46-48 of this title shall apply with full force and effect in the administration and enforcement of this chapter." (Brotherhood of Railroad Trainman v. Baltimore & Ohio Railroad Co. et al. 331 U.S. 519)*

In the case at issue, it is unquestioned that Bruce Darian is the duly designated Relator to the United States, in the case of *Brotherhood*, it is unquestioned that Brotherhood is the duly designated representative of the River Road trainmen.

> *"First. It is unquestioned that the Brotherhood is the duly designated*

*representative of the River Road trainmen."*

*(Brotherhood of Railroad Trainman v. Baltimore & Ohio Railroad Co. et al. 331 U.S. 519)*

As Relator under the False Claims Act, the Relator is granted an absolute right to federal jurisdiction for both federal and state claims.

*"31 U.S.C. 3732(b) Claims under state law. The district court shall have jurisdiction over any action brought under the laws of any State for the recovery of funds paid by a State or local government if the action arises from the same transaction or occurrence as an action brought under section 3730."*

The Supreme Court rejected the appellee railroad's contention to confine this meaning only to any proceeding before the Interstate Commerce Commission and to the exclusion of court proceedings.

*Second. The right of intervention granted to such a representative by § 17 (11) applies to a court proceeding*

*under § 16 (12) of the Act, the plain language of § 17 (11) extending its reach to "any proceeding arising under this Act."*

*On this point, however, the appellee railroads contend that § 17 (11) must be confined to proceedings before the Interstate Commerce Commission, to the exclusion of court proceedings. In support of this contention, they point to the fact that § 17 as a whole is primarily concerned with Commission procedure and organization. That fact is emphasized by the heading of § 17 as it appears in the Statutes at Large, 54 Stat. 913, and the United States Code, 49 U. S. C. § 17, a heading that reads: "Commission procedure; delegation of duties; rehearings." The inference is then made that paragraph (11), with which we are concerned, must be limited by that heading and by the general context of § 17 as a whole. The result of the contention is that the phrase "any proceeding arising under this Act, " as found in paragraph (11), is rewritten by construction to refer only to "any proceeding before the Commission arising under this section."*

*We cannot sanction such a construction of these words. It is true, of course, that § 17 is concerned primarily with the organization of the*

*Commission and its subdivisions and with the administrative disposition of matters coming within that agency's jurisdiction. At least ten of the twelve paragraphs of § 17 deal with those matters. And before § 17 was cast into its present form in 1940, all five of its paragraphs related exclusively to those matters. Congress rewrote the section when it enacted the Transportation Act of 1940, 54 Stat. 898, continuing and modifying previous provisions and consolidating and including matters which had formerly been scattered throughout the Act. n7 At the same time, however, it was expressly recognized that certain paragraphs were being added which were entirely new, paragraphs which went beyond purely administrative matters. Thus the pertinent committee reports stated n8 that "A new paragraph (9) is included providing that orders of a division, an individual Commissioner, or a board shall be subject to judicial review as in the case of full Commission orders, after an application for rehearing has been made and acted upon." And as to paragraph (11), it was said n9 that "A new paragraph is added at the end of section 17 providing that representatives of employees of a carrier may intervene and be heard in any proceedings arising under part I*

*affecting such employees." By such language in their reports, the framers of § 17 recognized the obvious fact that certain provisions of that section deal with something more than might be indicated by the heading.*

*(Brotherhood of Railroad Trainman v. Baltimore & Ohio Railroad Co. et al. 331 U.S. 519)*

n7 H. Rep. No. 1217, 76th Cong., 1st Sess., p. 13; H. Rep. No. 2832, 76th Cong., 3d Sess., p. 72.

n8 H. R. No. 2016, 76th Cong., 3d Sess., p. 67; H. Rep. No. 2832, 76th Cong., 3d Sess., p. 72.

n9 H. Rep. No. 1217, 76th Cong., 1st Sess., p. 15.

The framers of the False Claims Act used language that creates jurisdiction for both federal and state claims in the U.S. District Court. It would be unjustified for the Court to limit this plain language conferring jurisdiction.

*"Nor do we perceive any reason of statutory policy why the framers of § 17 (11) should have wished to confine*

*the right of intervention by employee representatives to proceedings before the Commission. Occasions may arise, as in this case, where the employee representatives have no interest in intervening in the original administrative proceeding, but where they have a very definite interest in intervening in a subsequent judicial proceeding arising under the Act. When the framers have used language which covers both types of proceedings,] we would be unjustified in formulating some policy which they did not see fit to express to limit that language in any way."*

*(Brotherhood of Railroad Trainman v. Baltimore & Ohio Railroad Co. et al. 331 U.S. 519)*

As in the case of Brotherhood creating an absolute right to intervene from the statutory language *"may intervene and be heard"* is the same as "Any action under section 3730 may be brought in any judicial district."

*"Since all the conditions of § 17 (11) have been satisfied in this case, the only question that remains is whether the Brotherhood is thereby accorded a permissive or an absolute right to*

> *intervene. The language of § 17 (11) is in terms of "may intervene and be heard," which might be construed as giving only a discretionary right. But our view, as we have indicated, is that once the requirements of § 17 (11) have been met, the employees' representative acquires an absolute right of intervention."*
>
> *(Brotherhood of Railroad Trainman v. Baltimore & Ohio Railroad Co. et al. 331 U.S. 519)*

Relator urges the Court that the term "may intervene" and "any action may be brought" have the same purpose and meaning. The absolute right to intervene in a court to protect the rights of those they are representing is no different than a Relator having the absolute right to protect his rights as a Relator and the rights of the United States government. This important jurisdictional issue cannot be left to the discretion of the court and would give rise to an uneven application of the False Claims Act.

*"The statutory term "may intervene" thus means "may intervene if the employees' representative so chooses" rather than "may intervene in the discretion of the court." And if the representative does choose to intervene, it may do so as a matter of right within the meaning of Rule 24 (a) (1) of the Federal Rules of Civil Procedure. Such is this case.*

*We thus conclude that § 17 (11) gives the Brotherhood an absolute right to intervene in this proceeding, making it unnecessary to discuss whether, and to what extent, the Brotherhood would have had such a right apart from § 17 (11). It follows that we have jurisdiction to consider the appeal on its merits. And in the exercise of that jurisdiction, we reverse the judgment of the District Court denying leave to the Brotherhood to intervene.*

*(Brotherhood of Railroad Trainman v. Baltimore & Ohio Railroad Co. et al. 331 U.S. 519)*

**31 USC 3729-3733 CLAIMS AGAINST THE UNITED STATES GOVERNMENT**

§ 3732. False claims jurisdiction

(a) Actions under section 3730. Any action under section 3730 may be brought in any judicial district in which the defendant or, in the case of multiple defendants, any one defendant can be found, resides, transacts business, or in which any act proscribed by section 3729 occurred. A summons as required by the Federal Rules of Civil Procedure shall be issued by the appropriate district court and served at any place within or outside the United States.

**Claims under state law. The district court shall have jurisdiction over any action brought under the laws of any State for the recovery of funds paid by a State or local government if the action arises from the same transaction or occurrence as an action brought under section 3730.**

XIV

## ARGUMENT 4

## RELATOR'S CONSTITUTIONAL RIGHT TO DUE PROCESS WAS VIOLATED BY RULING WITHOUT HEARINGS

1. The Court created a pattern of setting motions for hearing and then removing those hearings from the calendar just before the hearing date.
2. The Court prejudiced Relator's case by continuing to rule in chambers without oral argument on the several issues that were important to be argued before the court.
3. The Statute under the FCA clearly requires oral argument on any Motion to Dismiss a FCA action to be provided to the Relator.

4. The Court relied on Local Rules over the Federal Statute which requires oral hearing on a Motion to Dismiss.

5. Relator repeatedly objected to the Court denying hearings and made a showing that Relator was prejudiced by being denied oral hearings.

6. The Court held from the beginning that there was never going to be a hearing on any Motion throughout the entire case.

[**1861] If a relator initiates the FCA action, he must deliver a copy of the complaint, and any supporting evidence, to the Government, § 3730(b)(2), which then has 60 days to

intervene in the action, §§ 3730(b)(2), (4). If it does so, it assumes primary responsibility for prosecuting the action, § 3730(c)(1), though the relator may continue to participate in the litigation and is entitled to a hearing before voluntary dismissal and to a court determination of reasonobleness before settlement, § 3730(c)(2).

XV

ARGUMENT 5

THE UNITED STATES IS THE PLAINTIFF UNDER THE FALSE CLAIMS ACT AND THUS THE RELATOR AND THE U.S GOVERNMENT ARE STATUTORILY ENTITLED TO 60

**DAYS FROM FINAL JUDGMENT IN FILING AN APPEAL.**

The power to prosecute a False Claims Act action lies in Congress' power to enact laws that vest the power of inferior officers in the Executive. Here by statute Congress has clearly done so. In authorizing the President to investigate an FCA action through it's Attorney General and deputizing a Relator to work with the United States in recovering The public's money lost to fraud.

> " ... but the Congress may by law vest the appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."
>
> ( U.S. Const. ARTICLE II Section 2.)

Without the United States as the Plaintiff, there is no such thing as a False Claims Act qui tam action, Only an Executive prosecuted action. Congress has clearly provided for both. Without the United States as the Plaintiff, Relator would lack constitutional standing under Article III as the Act provides for frauds against the people of the United States and not that of Relator. The assignment and standing to collect the Relator's share of the bounty is established upon filing the suit under seal. If the United States is not the Plaintiff in a qui tam action then the Relator does not receive a maximum of 30 percent of the bounty plus costs and attorney fees. Under the present ruling with the Government not being a Plaintiff , Relator would share nothing with the Government which would completely defeat the purpose of the False Claims Act which is to enlist

The Public in fighting fraud against the government.

XVI

**ARGUMENT 6**

**The Government has no claims without Relator's continuing right to prosecute his claims.**

The Court's Order separating the Government from Relator and allowing the Government's claims to stand is clear error of the False Claims Act Qui Tam action. The Government would not have a case if it was not for the fact that the whistleblower has come forward under the Qui Tam provisions to provide the Government with all of the information. The standing to prosecute is granted upon the filing of the suit and cannot be revoked by the Court. Vermont v. Stevens

## XVII

## STANDARD OF REVIEW

Argument Number 1

Relator is a person who is expressly authorized to bring suit on his own behalf and on behalf of the Government

We review de novo the purely legal question whether a statute is constitutional. *Gray v. First Winthrop Corp., 989 F.2d 1564, 1567 (9th Cir. 1993).* We are mindful that we should invalidate an act of Congress only "for the most compelling constitutional reasons." *Mistretta v. United States, 488 U.S. 361, 384, 102 L. Ed. 2d 714, 109 S. Ct. 647 (1989)* [**11] (quoting *Bowsher v. Synar, 478 U.S. 714, 736, 92 L. Ed. 2d 583, 106 S. Ct. 3181 (1986)* (Stevens, concurring in judgment)). Furthermore, we recognize that we are obliged whenever "fairly possible" to interpret a statute in a manner that renders it constitutionally valid. *Communications*

*Workers of America v. Beck, 487 U.S. 735, 762, 101 L. Ed. 2d 634, 108 S. Ct. 2641 (1988).* Our adherence to this principle of presumptive constitutionality is guided by our understanding that "when we are required to pass on the constitutionality of an Act of Congress, we assume 'the gravest and most delicate duty that this Court is called on to perform.'" *Fullilove v. Klutznick, 448 U.S. 448, 472, 65 L. Ed. 2d 902, 100 S. Ct. 2758 (1980)* (citation omitted). See U.S. ex rel. Kelly v. Boeing 9 F .3d 743 at 757 (9th Cir. 1993)

Argument Number 2

The State is a person under the False Claims Act;

Argument Number 3

The FCA has original jurisdiction over all claims, both federal and state and pre-empts all other actions.

The Court reviews matters regarding subject matter jurisdiction de novo. Similarly, the Court reviews the district court's determination of complete preemption de novo *See Botsford v. Blue Cross 314 F.3d 390,393 U.S. 2002 U.S. App. LEXIS 26457; citing Delta Savings Bank v. United States, 265 F.3d 1017, 1024 (9th Cir. 2001), cert. Denied, 122 S. Ct. 816, 534 U.S. 1082, 151 L. Ed. 2d 700 (2002). Roach v. Mail Handlers Benefit Plan, CAN, 298 F.3d 847, 849 (9th Cir. 2002).*

Arguument Number 4

Reviewed de novo

Relator's constitutional right to due process was violated by ruling without hearings.

Argument 5

Reviewed de novo

The United States is the Plaintiff under the False Claims Act.

Argument 6

Reviewed de novo

The Government has no claims without Relator's continuing right to prosecute his claims

## XVIII

## CONCLUSION

The trial court's dismissing Relator/Appellant's FCA action against these Defendant's and others because Relator is not a lawyer is an abuse of

discretion. The Court holding that the state judge must approve a FCA action was also an abuse of discretion. The court erred in holding that the Federal court cannot adjudicate all claims whether federal or state under the False Claims Act. The state court judge was in clear absence of all jurisdiction in ruling that permission must first be granted before suing the receiver under the FCA. Appellant respectfully requests the court reverse the District Courts interlocutory order for lack of jurisdiction and remand for further proceedings based on Relator's right to sue under the FCA

Bruce Darian, as Relator under the False Claims Act urges the Court to hear the case on the merits. Congress has recognized the importance and the rarity of obtaining information from whistleblowers which leads to the recovery of money lost from the

government due to fraud. Relator has endured a long and hard fought battle spanning over eight years in this case alone.

This Court's resent holding that the United States is not the Plaintiff in a False Claims Act Qui Tam action overturns 1300 years of precedent.

For the foregoing reasons it is respectfully requested that the Courts ruling be vacated the Mandate recalled and the briefing schedule reset.

"Let us have faith that right makes might"

--Abraham Lincoln

DATED: September 10, 2009

Respectfully Submitted By:

BRUCE H. DARIAN, Pro Per
P.O. Box 42
Hollywood, CA 90078

By _____
United States of ~~America~~ ex rel. Darian

## XIX

## STATEMENT OF RELATED CASES

Appellant certifies that there is a known related case pending in the Supreme Court.